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THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION
COMMUNITY ANTENNA TELEVISION COMMISSION
LEVERETT SALTONSTALL BUILDING
100 CAMBRIDGE STREET, BOSTON 02202

JOHN M. URBAN
Commissioner

(617) 727-6925

September 29, 1993

VIA FEDERAL EXPRESS

Hon. Donna R. Searcy, Secretary
Office of the Secretary
Federal Communications Commission
Washington, DC 20554

Re: Rate Regulation - Third Notice of Proposed Rulemaking-
Docket No. 92-266

Dear Ms. Searcy:

I have enclosed an original and ten (10) copies of the Comments of the Massachusetts Cable Television Commission for filing in connection with the captioned matter.

Please place me on the service list for this docket matter.

In addition, please mark one copy of these comments "filed" and return it to me in the envelope I have enclosed.

Please do not hesitate to contact me if you should have any questions in connection with this matter. In the meantime, I appreciate your assistance.

Sincerely,

John M. Urban
Commissioner

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
	)	
Third Notice on Rate Regulation	)	

COMMENTS OF THE
MASSACHUSETTS COMMUNITY ANTENNA TELEVISION COMMISSION

The Massachusetts Community Antenna Television Commission (the "Massachusetts Commission") is the state agency charged with regulating the cable television industry in Massachusetts pursuant to Massachusetts General Law Chapter 166A. The Massachusetts Commission's responsibilities include representing the interests of the Commonwealth of Massachusetts before the Federal Communications Commission (the "FCC"). (M.G.L. 166A, §16 (1990)). Therefore, the Massachusetts Commission has a direct interest in the outcome of this proceeding.

We are writing in response to questions raised in the FCC's Third Notice of Proposed Rulemaking, dated August 27, 1993 (the "Third Notice"). In this Third Notice, the FCC asked for comment related to four issues:

"(1) the appropriate methodology for use of the benchmark to adjust capped rates when channels are added or deleted from a regulated tier; (2) whether we should permit cable operators who have completed rebuilds immediately prior to regulation, and whose rates are below the benchmark level, to raise their rates to the benchmark; 3) whether we should permit cable operators to elect either the benchmark or cost-of-service approach for different tiers of regulated service after the initial period of rate regulation; and 4) whether we should permit external cost treatment for costs of upgrades required by local franchise authorities, and, if so, whether local or federal standards should govern rate adjustments based on costs of such required upgrades." (Third Notice, paragraph 132).

Our following comments will, at least in part, address each of these four issues.

Benchmark Adjustments for Added/Deleted Channels

The FCC has stated that it is seeking comment on whether or not the methodology it selects for adjustments when adding/deleting channels "should provide sufficient incentives for cable operators to invest in continued growth of cable television service while not permitting operators to raise rates to unreasonable levels." (Third Notice, paragraph 136).

This office is sensitive to the issue of maintaining an environment in which cable operators will continue to offer new services. The Massachusetts Commission would not wish to present comments that would injure the development of new cable services. Therefore, at the very least, we conclude that the benchmarks should not create a disincentive for adding channels.

The FCC has stated that, of its three alternative proposals, its intended approach for making these corrections "is consistent

with the overall treatment of above and below benchmark systems envisioned in the Report Order." (Third Notice, paragraph 140). Upon review of these three alternatives, our rate analysts concur with the FCC's third alternative, which allows operators to retain their relative position above or below the benchmark (as outlined in paragraph 139 of the Third Notice). In our opinion, this alternative is fair and reasonable and does not appear to create either incentives or disincentives for adding channels.

We use this opportunity to state that we support fine-tuning the benchmark to the extent that it is in the public interest and does not impact the integrity of the FCC's benchmark model. However, we recommend that the FCC reject any modification of the benchmarks that results in "doctoring" the tables. Our understanding is that the tables developed by the FCC represent the statistical relationship between systems that experience "effective competition" and those that do not operate in an environment of effective competition, as defined by the statute. If the FCC is attempting to more accurately represent this statistical relationship, we support the action. If, however, this is an attempt to alter the statistical model with "empirical" data that is introduced outside of the FCC's model, we believe that it should be rejected.

As we stated in our comments on the Second Notice, our office supports the concept of a benchmark/cost-of-service approach. We recognize the fact that the brief time allowance given to the FCC to develop its regulations resulted in a benchmark model that may

not be optimal, but is, at least for the time being, suitable. As we have stated in the past, we believe that there is a need to review the current benchmarks to determine if a more cost-based model would better serve the determination of reasonable rates.

Benchmark Treatment for Rebuilt Systems

The FCC has stated that "[s]ome cable operators with rates below benchmark levels may have initiated or completed system upgrades shortly before rate regulation. It is possible that the initiation of rate regulation could prevent systems with rates below benchmark levels from raising rates to recover such upgrade costs." (Third Notice, paragraph 145). We note that we have some question as to the extent to which upgrades have required rate increases in order to assure a reasonable return. For example, when systems are upgraded they typically introduce at least some declining costs due to technical and operational economies of scale. In addition, upgrades often increase the deployment of fiber optic cable, which in turn reduces the number of active system components and their associated maintenance costs. As we are not fully aware of the total net cost impact of system upgrades, we are unable to recommend a special allowance for these systems.

Absent an allowance for these systems that completed re-builds shortly before regulation, these systems would have the option of relying on a cost-of-service approach to ensure a reasonable rate if one is denied by the benchmark. While we have

stated that we are concerned about the administrative burdens of cost-of-service showings, we believe that the opportunity for creating a windfall should be avoided, especially in consideration with the current Congressional sentiment concerning implementation of rate regulation.

Parallel Methods for BBT and CPS Rate Regulation

The FCC stated that "[t]he Rate Order did not explicitly state whether [a] cable operator is permitted to choose the cost-of-service approach for one tier and [the] benchmark approach for the other tier, or whether parallel treatment for both tiers is required in setting initial rates." (Third Notice, paragraph 146). The FCC states that "[b]ased on the record before us at this time, we tentatively conclude that cable operators should be required to elect either the benchmark or the cost-of-service approach for all regulated tiers. Thus, if a system becomes subject to regulation at the local level and seeks to justify its basic service rates using the benchmark system, the reasonableness of its cable programming services rates will also be judged under the benchmark should a complaint be filed about rates with the Commission." (Third Notice, paragraph 148).

The FCC, in the Third Notice, has provided justification to support its tentative conclusion that the same regulatory approach should be used to regulate either tier. From a policy perspective, we consider the FCC's reasoning to be sound.

The FCC's benchmark rates are based on average channel

charges. We would expect that the programming costs associated with the cable programming services tier would be higher than that of the broadcast basic tier. If this is the case, a non-parallel review would provide cable operators with the benefits of the averaging scheme by using the benchmark at the basic tier level, while subsequently enjoying the high rate findings of the higher cost cable programming services tier. Utilizing a non-parallel approach would throw the integrity of the benchmark into jeopardy as the "gains" of averaged rates for the basic service tiers would be realized while the off-setting "losses" of averaged rates for cable programming services tier would be avoided.

For the reasons stated above, we find that the FCC has a rational basis for requiring a parallel approach to regulating the two tiers. Yet, we are concerned that requiring a parallel approach will increase the number of cost-of-service cases before us (and the FCC). This raises the policy question of whether or not additional cost-of-service hearings would be counter to the goals of minimizing administrative burdens. We believe that this consideration must be weighed in the FCC's determination.

As stated earlier, we believe that the FCC's tentative decision of requiring parallel approaches is sound, and we would support this position. Yet, given the presence of conflicting policy goals on this matter, we also state that we would not criticize a decision by the FCC to allow a non-parallel approach as we believe that the concerns of administrative burdens are

sufficient enough to warrant this position.

We suggest, as a possible alternative, that when an operator seeks to have rates reviewed in a non-parallel fashion, they would be limited to seeking a cost-of-service hearing by the FCC and a benchmark determination for the basic service tier, in the event that the basic service tier regulator agrees to this allowance. If the basic service tier regulator, using its own discretion, determines that a cost-of-service hearing shall be conducted at the local level, a parallel process shall then be used.

We find that this allowance would be consistent with earlier decisions by the FCC that gave franchising authorities the option of not regulating basic service tier rates. The FCC has stated that if a local regulator believes existing rates are reasonable, it is not required to regulate rates. Consistent with this reasoning, we conclude that if a local regulator assumes that the benchmark rates in a non-parallel rate review produce reasonable rates, it should have the discretion of opting out of a cost-of-service review. If, however, a local regulator is concerned about the resulting rates from a non-parallel approach, it could, at its option, choose to conduct a cost-of-service showing.

In a later part of this section of the Third Notice, the FCC has stated that it seeks comment on the procedures that it might implement to coordinate the local and federal processes for regulating the basic service and cable programming services tiers. (Third Notice, paragraph 150).

In response to this question, the Massachusetts Commission would like to put forward some draft regulatory language that would allow both the FCC and local regulators to rely on each others findings, where beneficial and where one party is regulating one tier after the other has already acted on another tier. We suggest that the following draft regulations may be useful:

> Upon the commencement of a cable programming services rate determination, the FCC may, at its option, use the record and written statement of the basic service tier rate determination, if that determination was made for rates that simultaneously went into effect as a basis for determining the per-channel rate.
>
> A basic service tier rate regulator may similarly use a cable programming services tier rate determination as its record in making its per-channel finding.
>
> If either the FCC or the basic service tier regulator requests the written statement for the regulation of a tier, and the subsequent rate determination is materially different from the determination made for the other regulated tier, it shall forward a copy of its written statement to entity that regulated the alternative tier.

We believe that these regulations would be useful to local and state regulators in cases where the FCC regulated a rate prior to our determination. Likewise, we expect that our rate determinations may provide the FCC with a reduced administrative burden.

External Cost Treatment for Upgraded Systems

The FCC stated that it seeks "comment on whether [it] should permit external cost treatment for costs of upgrades required by

local franchise authorities." (Third Notice, paragraph 153). In seeking comment, the FCC has sought responses to two approaches for determining external cost treatment for rates on upgraded cable system. The first approach would ". . . require that any such costs be governed by the cost-of-service standards that the Commission adopts in its Cost-of-Service Proceeding . . . [the second would permit] local franchise authorities to determine the way in which rates would be adjusted to reflect upgrade costs, including over what period of time such costs would be recovered, the operator's profit on upgrade costs, and other issues involved in cost-of-service standards." (Third Notice, paragraph 154).

In reviewing this question, we first point out the important distinction between upgrades that are required by the local franchising authority as opposed to upgrades that are the result of the operator's own initiative. We believe that different treatment may be warranted for each of these instances. We further note that the FCC may want to consider instances where cost-of-service allowances will not considered because upgrades that are above and beyond the requirements of the franchise agreement were made at the operator's own initiative in a manner that was objected to, or beyond the control of, the franchising authority.[1]

Where cable upgrades are made upon the sole initiative of the cable operator, we believe that there may be justification

[1] Local and state regulators should be cognizant of, and able to control, the regulatory incentive for over-investment that can result from cost-of-service regulation.

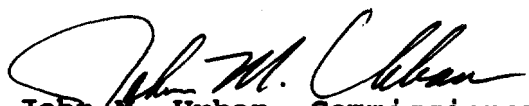
for permitting franchise authorities to determine the way in which rates would be adjusted to reflect upgrade costs, including over what period of time such costs would be recovered. Alternatively, in instances where upgrades are the result of franchise requirements, the FCC should require that any such costs be governed by the cost-of-service standards that the FCC adopts in its Cost-of-Service proceeding.

We further propose that in instances where upgrades are the result of franchise requirements, the operator should be required to submit a pro-forma cost-of-service showing prior to the signing of a renewal agreement. This process would be useful for franchising authorities in that it would specify the costs associated with their new requirements prior to the institution of these new requirements. This would likewise be useful for operators in that it would better allow them to specifically translate the subscriber costs during franchise renewal negotiations.

* * *

In closing, as always, we thank the FCC for the opportunity to comment on this process, and we wish to state our thanks to the FCC staff members who have been of continued assistance to us in dealing with the rate regulation issues that are before us.

Respectfully Submitted,



John M. Urban, Commissioner
September 29, 1993